

**A Spatial Design Architects Sdn Bhd v Majlis Perbandaran Klang
& Ors**

B HIGH COURT (SHAH ALAM) — JUDICIAL REVIEW
NO BA-25-52-08 OF 2021
SHAHNAZ SULAIMAN J
10 OCTOBER 2024

C *Administrative Law — Judicial review — Application for — Applicant applied for judicial review against decisions of first respondent in rejecting all seven of applicant's application for planning permission — Whether application was academic — Whether impugned decision by first respondent was illegal — Whether directives or circulars relied upon by first respondent were ultra vires*
D — *Town and Country Planning Act 1976 ss 21C & 58(3)*

E The first respondent was the local authority for the area of Klang, Selangor, exercising its functions under s 6 of the Town and Country Planning Act 1976 ('the TCPA') while the applicant was an architectural consultancy practice firm established under the Architects Act 1967. In order to undertake or carry out any development in Klang, the applicant (be it owner for the land or otherwise) shall first obtain planning permission in respect of the development pursuant to the provisions of the TCPA from the first respondent. The application for such planning permission was typically submitted to the One Stop Centre Department ('OSC') of the first respondent. The applicant was appointed by seven respective landowners or developer as consultant to apply for planning permission and approval for building plan for new proposed development and existing, completed factory buildings. The relevant applications were submitted to the OSC of the first respondent's approval. The applicants' applications were all rejected and/or not accepted by the OSC on the ground, inter alia, that the person submitting the application was not a registered town planner ('the impugned decision'). The applicant thus applied for a judicial review against the decisions of the first respondent in rejecting all seven of the applicant's applications for planning permission. The applicant believed that the impugned decision was based upon two circulars issued by the Selangor Town and Country Planning Department ie the 2005 Circular and 2006 Circular. Under the 2006 Circular which repealed the 2005 Circular, it was stated that: (a) only consultant registered with the Town and Country Planning Department was entitled to sign plans and documents pertaining to application of planning permission; (b) it was mandatory for the local planning authority to adopt such 2006 Circular. Among the reliefs sought by the applicant were: (i) declarations that: (A) the applicant was a qualified person to prepare plans, documents and reports pertaining to the application for planning permission under the TCPA and the Federal Territory (Planning)

Act 1982; (B) the condition imposed by the respondents that the submission of plan and document for planning permission was limited to registered town planner only was illegal under ss 21C and 58(3) of the TCPA; and (C) the condition was a breach of fundamental rights of the applicant under art 8 of the Federal Constitution according to s 8 of the Architects Act 1967 read with s 58(3) of the TCPA; and (ii) a prohibition order against the respondents to impose the condition through any circular/rules/checklists/guidelines/bylaws/through reregistration of consultant/requiring 'certain seal'/certain 'signature seal'/seal of certain party/or any way and/or method which was illegal and/or contrary with existing Acts. According to the first respondent, the applicant had submitted and re-submitted the application for planning permission in respect of the same seven building plans. Out of the seven applications for planning permission, five had been approved; while one was rejected for being in contravention of the residential zoning; and the remaining one application was considered to have been discontinued by the applicant due to the applicant's failure to upload documents. Therefore, the respondents took the view that the matter has been rendered academic.

A

B

C

D

Held:

- (1) This application could not be rendered academic simply because the applicant's application for planning permission had been approved. The impugned decision was a live issue which begged the court's intervention for the following reasons: (a) the subsequent rejection and/or approval of the applicant's application for planning permission were premised upon a totally different ground compared to that of the impugned decision; (b) it could not be assumed that the first respondent would not impose a similar condition to the impugned decision; and (c) the issue that the application could only be submitted through registered town planner had been prevalent for the past decades. Therefore, the objection on the ground of it being rendered academic ought to be dismissed (see paras 20 & 22).
- (2) The applicant being an architectural consultancy practice was entitled to prepare and submit an application for planning permission. The Town Planners Act 1995 ('the TPA') was not to restrict other professions from continuing their practice under their respective laws. The intention of Parliament in incorporating certain entitlement into the TPA regulating certain profession was not to put any profession in a position better than the other. Therefore, without anything to the contrary, the preference of one profession over the other in one particular matter (such as the submission of application for planning permission), should not be accepted. Therefore, the first respondent in making the impugned decision, especially in light of their failure to rebut the same through their affidavit, was tainted with illegality and warranted the intervention of the court (see paras 26, 29, 31 & 34).

E

F

G

H

I

- A (3) There was no evidence pertaining to the directive or circular or guideline the first respondent relied upon in coming out with the impugned decision. The 2006 Circular was ultra vires the provision of s 58(3) of the TCPA which stipulated that ‘the entitlement of such person shall not be affected’, and the legislative intent of s 21C of the TCPA read with s 13 of the TPA. Pursuant to s 22 of the TCPA, it was incumbent upon the local planning authority to consider each application for planning permission on a case-to-case basis (see paras 40 & 47–48).
- B

[Bahasa Malaysia summary]

- C Responden pertama adalah pihak berkuasa tempatan bagi kawasan Klang, Selangor, yang menjalankan fungsinya di bawah s 6 Akta Perancangan Bandar dan Desa 1976 (‘APBD’) manakala pemohon adalah firma amalan perundingan seni bina yang ditubuhkan di bawah Akta Arkitek 1967. Untuk melaksanakan atau menjalankan sebarang pembangunan di Klang, pemohon
- D (sama ada pemilik tanah atau sebaliknya) hendaklah terlebih dahulu mendapatkan kebenaran merancang berhubung dengan pembangunan tersebut menurut peruntukan APBD daripada responden pertama. Permohonan kebenaran merancang tersebut biasanya diserahkan kepada Jabatan Pusat Sehenti (‘OSC’) responden pertama. Pemohon telah dilantik
- E oleh tujuh pemilik tanah atau pemaju masing-masing sebagai perunding untuk memohon kebenaran merancang dan kelulusan pelan bangunan bagi pembangunan baharu yang dicadangkan serta bangunan kilang sedia ada yang telah siap. Permohonan-permohonan yang berkaitan telah dikemukakan kepada OSC untuk pertimbangan responden pertama.
- F Permohonan-permohonan pemohon semuanya ditolak dan/atau tidak diterima oleh OSC atas alasan, antara lain, bahawa orang yang mengemukakan permohonan tersebut bukan perancang bandar berdaftar (‘keputusan yang dipertikaikan’). Pemohon oleh itu memohon semakan kehakiman terhadap keputusan responden pertama dalam menolak kesemua tujuh permohonan
- G kebenaran merancang pemohon. Pemohon percaya bahawa keputusan yang dipertikaikan adalah berdasarkan dua pekeliling yang dikeluarkan oleh Jabatan Perancangan Bandar dan Desa Selangor iaitu Pekeliling 2005 dan Pekeliling 2006. Di bawah Pekeliling 2006 yang memansuhkan Pekeliling 2005, dinyatakan bahawa: (a) hanya perunding yang berdaftar dengan Jabatan
- H Perancangan Bandar dan Desa berhak untuk menandatangani pelan dan dokumen berkaitan permohonan kebenaran merancang; (b) adalah mandatori bagi pihak berkuasa perancang tempatan untuk menerima pakai Pekeliling 2006 tersebut. Antara relif yang dipohon oleh pemohon adalah:
- I (i) pengisytiharan bahawa: (A) pemohon adalah orang yang berkelayakan untuk menyediakan pelan, dokumen dan laporan berkaitan permohonan kebenaran merancang di bawah APBD dan Akta (Perancangan) Wilayah Persekutuan 1982; (B) syarat yang dikenakan oleh responden bahawa penyerahan pelan dan dokumen untuk kebenaran merancang hanya terhad kepada perancang bandar berdaftar adalah menyalahi undang-undang di

bawah ss 21C dan 58(3) APBD; dan (C) syarat tersebut adalah pelanggaran hak asasi pemohon di bawah perkara 8 Perlembagaan Persekutuan menurut s 8 Akta Arkitek 1967 dibaca bersama s 58(3) APBD; dan (ii) perintah larangan terhadap responden untuk mengenakan syarat tersebut melalui sebarang/peraturan/senarai semak/garis panduan/undang-undang kecil/melalui pendaftaran semula perunding/memerlukan 'meterai tertentu' /tandatangan tertentu/meterai pihak tertentu/atau sebarang cara dan/atau kaedah yang menyalahi undang-undang dan/atau bertentangan dengan akta-akta sedia ada. Menurut responden pertama, pemohon telah mengemukakan dan mengemukakan semula permohonan kebenaran merancang berhubung dengan tujuh pelan bangunan yang sama. Daripada tujuh permohonan kebenaran merancang, lima telah diluluskan; manakala satu ditolak kerana bercanggah dengan zon kediaman; dan satu permohonan yang tinggal dianggap telah diberhentikan oleh pemohon disebabkan oleh kegagalan pemohon memuat naik dokumen. Oleh itu, responden berpendapat bahawa perkara tersebut telah menjadi akademik.

A

B

C

D

Diputuskan:

- (1) Permohonan ini tidak boleh dianggap akademik semata-mata kerana permohonan kebenaran merancang pemohon telah diluluskan. Keputusan yang dipertikaikan merupakan isu yang masih hidup yang memerlukan campur tangan mahkamah atas sebab-sebab berikut:
 - (a) penolakan dan/atau kelulusan berikutnya bagi permohonan kebenaran merancang pemohon adalah berdasarkan alasan yang sama sekali berbeza berbanding dengan keputusan yang dipertikaikan;
 - (b) tidak boleh diandaikan bahawa responden pertama tidak akan mengenakan syarat yang serupa seperti keputusan yang dipertikaikan;
 - dan (c) isu bahawa permohonan hanya boleh dikemukakan melalui perancang bandar berdaftar telah berleluasa sejak beberapa dekad yang lalu. Oleh itu, bantahan atas alasan ia menjadi akademik haruslah ditolak (lihat perenggan 20 & 22).
- (2) Pemohon sebagai firma amalan perundingan seni bina berhak untuk menyediakan dan mengemukakan permohonan kebenaran merancang. Akta Perancang Bandar 1995 ('APB') bukanlah untuk menyekat profesion lain daripada meneruskan amalan mereka di bawah undang-undang masing-masing. Niat Parlimen dalam memasukkan hak tertentu ke dalam APB yang mengawal selia profesion tertentu bukanlah untuk meletakkan mana-mana profesion dalam kedudukan yang lebih baik daripada yang lain. Oleh itu, tanpa apa-apa yang sebaliknya, keutamaan satu profesion berbanding yang lain dalam satu perkara tertentu (seperti penyerahan permohonan kebenaran merancang), tidak seharusnya diterima. Oleh itu, responden pertama dalam membuat keputusan yang dipertikaikan, terutamanya memandangkan kegagalan mereka untuk menyangkalnya melalui affidavit mereka, telah dicemari

E

F

G

H

I

- A dengan kepenyalahan undang-undang dan memerlukan campur tangan mahkamah (lihat perenggan 26, 29, 31 & 34).
- (3) Tiada bukti berkaitan dengan arahan atau pekeliling atau garis panduan yang responden pertama bergantung kepadanya dalam membuat keputusan yang dipertikaikan. Pekeliling 2006 adalah ultra vires peruntukan s 58(3) APBD yang menyatakan bahawa 'hak seseorang itu tidak boleh terjejas', dan niat perundangan s 21C APBD dibaca bersama s 13 APB. Menurut s 22 APBD, adalah menjadi tanggungjawab pihak berkuasa perancang tempatan untuk mempertimbangkan setiap permohonan kebenaran merancang berdasarkan kes demi kes (lihat perenggan 40 & 47–48).]
- B
- C

Cases referred to

- D *Bar Council Malaysia v Tun Dato' Seri Arifin bin Zakaria & Ors (Persatuan Peguam-Peguam Muslim Malaysia, intervener) and another appeal* [2020] 4 MLJ 773; [2018] 10 CLJ 129, FC (refd)
- Council of Civil Service Unions & Ors v Minister of Civil Service* [1985] AC 374, HL (refd)
- E *Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and other appeals* [2023] 3 MLJ 829, FC (refd)
- Perbadanan Pengurusan Sunrise Garden Condominium v Sunway City (Penang) Sdn Bhd & Ors and another appeal* [2023] 2 MLJ 621; [2023] 2 CLJ 333, FC (refd)
- F *Pinpoint Consortium (M) Sdn Bhd v Mammoth Empire Land Sdn Bhd* [2020] 10 MLJ 60; [2020] 5 CLJ 281, HC (refd)
- R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, FC (refd)
- Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177, FC (refd)

G Legislation referred to

- Architects Act 1967 s 8
Federal Constitution art 8
Federal Territory (Planning) Act 1982
- H Rules of Court 2012 O 53, O 53 r 3, r 3(2), r 3(7)
Town Planners Act 1995 s 13, 13(2)
Town and Country Planning (Amendment) Act 1995
Town and Country Planning Act 1976 ss 6, 21, 21C, 22, 58(2)(h), 58(3)
- I *Chua Li Li (with Raja Nurul Farah bt Raja Razaman, Manoharan Malayalam and Surendra Ananth) (Lily Chua & Assoc) for the applicant.*
Mohd Fadzil Amin (Khairul Fadzli Amin & Co) for the first respondent.
Khairul Nizam bin Abu Bakar (Selangor State Legal Advisor's Office) for the second respondent.

Kogilambigai Muthusamy (Attorney General's Chamber) for the third and fourth respondents. A

Shahnaz Sulaiman J:

PRELUDE B

[1] The applicant, an architectural consultancy practice firm established under the Architects Act 1967, applied to this court for a judicial review against the decisions of the first respondent on 30 December 2020 in rejecting all seven of the applicant's applications for planning permission. C

[2] At the leave stage of this application for judicial review, this court dismissed the applicant's leave application. Dissatisfied with the decision of this court, the applicant appealed to the Court of Appeal. D

[3] Having heard the appeal, the Court of Appeal on 31 July 2023 allowed the appeal with the following order:

(a) the appellant/applicant was granted an extension of time under O 53 r 3(7) of the Rules of Court 2012 to obtain leave to commence judicial review proceedings under O 53 r 3 of the Rules of Court 2012; and E

(b) the appellant/applicant was granted permission to commence judicial review proceedings under O 53 r 3 of the Rules of Court 2012, provided that the applicant undertakes to file an application to amend the statement under O 53 r 3(2) of the Rules of Court 2012 and the reliefs so that it is clear that the decision being challenged is the decision dated 30 December 2020. F

BACKGROUND FACTS G

[4] The first respondent is the local authority for the area of Klang, Selangor, exercising its functions under s 6 of the Town and Country Planning Act 1976 ('the TCPA 1976'). In order to undertake or carry out any development in Klang, the applicant (be it owner for the land or otherwise) shall first obtain planning permission in respect of the development pursuant to the provisions of the TCPA 1976, from the first respondent. The application for such planning permission is typically submitted to the One Stop Centre Department ('OSC') of the first respondent. H

[5] In the instant case, the applicant was appointed by seven respective landowners or developer as consultant to apply for planning permission and approval for building plan for new proposed development and existing, completed factory buildings under the Limited Planning Permission Amnesty I

- A Programme (Program Pemutihan Kebenaran Merancang Terhad) initiated by the Selangor government. A total of seven developments were involved and the relevant applications were submitted to the OSC of the first respondent's approval.
- B [6] The applicants' applications were all rejected and/or not accepted by the OSC for various reasons. One of them was remarked as 'Notes from the OSC: Planning Permission: online application (OSC 3.0 Plus) and physical application shall be submitted by the registered town planner' (*Nota OSC: KM: Permohonan dalam talian (OSC 3.0 Plus) dan secara hardcopy hendaklah dikemukakan oleh Perancang Bandar Berdaftar*) ('impugned decision'). This impugned decision formed the subject of this application for judicial review.
- C
- D [7] In granting leave in favour of the applicant, the Court of Appeal unanimously found that, as stated in their broad grounds, the issues before this court would be:
- E ... and we also have regard to the seriousness and public interest element involving a very important point of law with respect to the applicability of s 8(2)(b) of the Architects Act 1967 and s 21C(a) of the Town and Country Planning Act 1976 ('the TCPA') which refers to s 58(2)(h) of the TCPA.
- ...
- F [8] The reliefs sought by the applicant could be succinctly reproduced as follows:
- G (i) declarations that:
- H (a) the applicant is a qualified person to prepare plans, documents and reports pertaining to the application for planning permission under the TCPA 1976 and the Federal Territory (Planning) Act 1982;
- I (b) the condition imposed by the respondents that the submission of plan and document for planning permission is limited to registered town planner only is illegal under sub-ss 21C and 58(3) of the TCPA 1976; and
- (c) the said condition mentioned in sub-paragraph (b) above is a breach of fundamental rights of the applicant under art 8 of the Federal Constitution, according to s 8 of the Architects Act 1967 read with sub-s 58(3) of the TCPA 1976.
- (ii) an order of certiorari to quash and/or set aside the impugned decision;
- (iii) the order of mandamus:
- (a) against the third and fourth respondents to prepare rules and list of

- qualified person who is qualified to prepare and submit plan and document for planning permission according to s 21C of the TCPA 1976; A
- (b) the second respondent be compelled to publish through gazette listing qualified person who is qualified to prepare and submit plan and document for planning permission according to s 21C of the TCPA 1976; B
- (c) the respondents be compelled to accept submission of application for planning permission under s 21 of the TCPA 1976 and consider the same in accordance with s 22 of the same Act. C
- (iv) a prohibition order against the respondents to impose condition on 'Submission of Plan, Report and Document for Planning Permission is Only limited to Registered Town Planner only' through any circular/rules/checklists/guidelines/bylaws/through reregistration of consultant/requiring 'certain seal'/certain 'signature seal'/seal of certain party/or any way and/or method which is illegal and/or contrary with existing Acts. D
- [9] The applicant however, in its written submissions, prayed for only paras 2.1, 2.2, 2.3 and 2.8 (which in turn, refers to sub-paras (i) and (iv) above) to be allowed. E
- [10] It is pertinent to note that the second respondent being the Director General of the Town and Country Planning Department (known as PLANMalaysia) for the state of Selangor did not file any affidavit. The learned Assistant State Legal Advisor representing the second respondent did not make any submissions and took the position that they will leave the matter to the court to decide. F
- G
- PRINCIPLES RELATING TO JUDICIAL REVIEW
- [11] Order 53 of the Rules of Court 2012 provides for the procedures for an application for judicial review. H
- [12] It is trite law that a decision in relation to the exercise of public duty or function may be reviewed on grounds of illegality, irrationality, procedural impropriety or disproportionality. I
- [13] These grounds were laid down by Lord Diplock in the case of *Council of Civil Service Unions & Ors v Minister of Civil Service* [1985] AC 374 which was adopted by the Federal Court in the case of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 as follows:

- A** In this context, it is useful to note how Lord Diplock (at pp 410–411) defined the three grounds of review, to wit, (i) illegality, (ii) irrationality, and (iii) procedural impropriety. This is how he put it:
- B** By ‘illegality’ as a ground for Judicial Review I mean that the decision maker must understand directly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the state is exerciseable.
- C** By ‘irrationality’ I mean what can by now be succinctly referred to as ‘Wednesbury unreasonableness’ (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.
- D** Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the courts’ exercise of this role, resort I think is today no longer needed to Viscount Radcliffe’s ingenious explanation in *Edwards (Inspector of Taxes) v Bairstow and another respondents* [1956] AC 14, of irrationality as a ground for a court’s reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. ‘Irrationality’ by now can stand on its own feet as an accepted ground on which a decision may be attacked by Judicial Review.
- E**
- F** I have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failing to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to Judicial Review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.
- G** Lord Diplock also mentioned ‘proportionality’ as a possible fourth ground of review which called for development.

ANALYSIS

H *Academic*

- I** [14] According to the first respondent, the applicant had submitted and re-submitted the application for planning permission in respect of the same seven building plans (upon which the impugned decision was founded) between 28 December 2020 (the date the impugned decision was given) and the year 2022.

[15] Out of the seven applications for planning permission, five had been approved, while one was rejected for being in contravention of the residential

zoning stipulated in the 2035 Klang Municipal Council Local Plan. The remaining one application was considered to have been discontinued by the applicant due to the applicant's failure to upload documents.

A

[16] Therefore, founded on the foregoing circumstances, the first, third and fourth respondents took the view that the matter has been rendered academic.

B

[17] The third respondent and fourth respondent submitted that:

- (a) the applicant being an architectural consultancy practice firm who was entitled to submit application for planner permission on 22 June 2021 (after the impugned decision is given) rendered its earlier complaint — that only a registered town planner is entitled to do so — academic, and since there is no longer a live issue to be decided, this application ought to be dismissed by this court 'without further ado';
- (b) it follows that the declaratory reliefs sought by the applicant is of no practical utility; and
- (c) since there is no written grounds from the Court of Appeal, it was submitted that the issue of res judicata does not arise. This was particularly so when the arguments put forth in the Court of Appeal were based on a different factual matrix compared to that of this court.

C

D

E

[18] The applicant in reply submitted that such requirement of only a registered town planner is entitled to submit application for planning permission still exists in the checklist. This was notwithstanding that there are new developments in respect of the seven applications for planning permission by the applicant after the impugned decision. Hence, it was argued by the applicant that the impugned decision is very much a live issue and may affect the applicant in future applications.

F

G

[19] The applicant relied on two cases, namely *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177 and *Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and other appeals* [2023] 3 MLJ 829.

H

[20] In the considered view of this court, this instant application cannot be rendered academic simply because the applicant's application for planning permission has been approved. The impugned decision is, in the view of this court, a live issue which begs this court's intervention for the following reasons:

I

- (a) the subsequent rejection and/or approval of the applicant's application for planning permission were premised upon a totally different ground compared to that of the impugned decision;
- (b) it cannot be assumed that the first respondent will not impose a similar

- A condition to the impugned decision; and
- (c) the issue that the application can only be submitted through registered town planner has been prevalent for the past decades.
- B [21] The Federal Court in *Bar Council Malaysia v Tun Dato' Seri Arifin bin Zakaria & Ors (Persatuan Peguam-Peguam Muslim Malaysia, intervener) and another appeal* [2020] 4 MLJ 773; [2018] 10 CLJ 129 had stated:
- C [59] One limited exception to the general rule is in relation to questions of public law. In *R v Secretary of State for the Home Department ex p Salem* [1999] AC 450 at p 456, Lord Slynn of Hadley held:
- D ... in a cause where there is an issue involving a public authority as to a question of public law, *their Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided* which directly affect the rights and obligations of the parties inter se. *However the discretion to hear disputes must be exercised with caution*, and academic appeals should not be heard “in the public interest for doing so.
- E [60] By way of example, features of academic cases suitable for determination include: (a) discrete point of statutory construction (b) a situation where it does not involve detailed considerations of fact and (c) a situation where there is a large number of similar cases which need to be resolved.
- F ...
- [62] In this case, as in *Salem*, ‘the factors are by no means straightforward and in other cases the problem of when a determination is made may depend on the precise factual context of each case’. The factual matrix of the case was novel; no other similar controversy has arisen before or since. Following *Bhewa*, especially if counsel chooses not to advance any submissions in light of the subsequent development, it would not be appropriate for the court to make a determination on the questions posed. (Emphasis added.)
- G [22] Hence, founded on *Bar Council Malaysia* the court has the discretion to decide whether to deal with an issue which has been rendered academic, though the discretion must be exercised sparingly. The impugned decision is in the view of this court, a live issue. Therefore, the objection on the ground of it being rendered academic in this court’s view, ought to be dismissed.
- H *The impugned decision by the first respondent*
- I [23] The seven applications filed by the applicant was not accepted by the first respondent on 30 December 2020. The OSC rejected the application on the grounds the person submitting the application is not a registered town planner.
- [24] In this regard, s 21C of the TCPA 1976 reads:

- 21C Preparation of plan, etc. by a qualified person **A**
- All plans, particulars, layout plans and other documents required to be submitted under this Act shall be prepared by —
- (a) a person whose qualifications are prescribed under paragraph 58(2)(h); or
 - (b) a person who is entitled to do so under any other written law. **B**
- [25] Moreover, s 8 of the Architects Act 1967 reads:
- 8 Entitlement
- (1) Subject to sections 7A and 7B, only an Architect or a foreign architect who is residing in Malaysia for not less than one hundred and eighty days in any one calendar year shall be entitled to submit plans or drawings to any person or authority in Malaysia. **C**
 - (2) Nothing contained in any other written law shall prevent any Architect, foreign architect or architectural consultancy practice from — **D**
 - (a) making valuations of buildings and structures, and of plants, machinery and equipment related to the buildings or structures connected with his or its professional practice;
 - (b) preparing and submitting applications for planning approvals, conversions, subdivisions and amalgamation layout drawings; **E**
 - (c) carrying out planning studies, environmental impact studies relating to land use; and
 - (d) preparing planning reports for any person or authority in Malaysia. **F**
 - (3) Nothing in subsections (1) and (2) shall affect the right of any quantity surveyor, engineer, licensed land surveyor, valuer, appraiser and any other professionals for the time being registered under the relevant laws relating to such professions, to carry out any activity connected with his professional practice. **G**
- [26] Founded on the provisions reproduced above, specifically para 8(2)(b), this court is of considered view that the applicant being an architectural consultancy practice is entitled to prepare and submit an application for planning permission. **H**
- [27] The third respondent and the fourth respondent averred that they had never issued any directive to stop or prevent anyone entitled under any law to prepare and submit plans, documents, layout plans which is related to town and country planning to any person or local authority (para 9.6 of encl 52). **I**
- [28] In this regard, s 13 of the Town Planners Act 1995 grants the entitlement to registered town planner to prepare and submit application for the purpose of developing any land as reproduced below:

A 13 Entitlement

- (1) Every registered Town Planner shall be entitled to —
 - (a) prepare development plans such as structure plans and local plans for the purposes of the Town and Country Planning Act 1976;
 - (b) carry out urban, rural and regional development planning studies, and feasibility and environmental impact assessment studies relating to land use; and
 - (c) prepare and submit applications for planning permission, subdivisional layouts, drawings and planning reports to any person or public authority for the purposes of developing any land.
- (2) Nothing contained in this section shall affect the entitlement of any other person under any other written law to do any of the things under paragraphs (1)(a), (b) and (c).

D

[29] In this respect, this court is of the view that sub-s 13(2) of the Town Planners Act 1995 sufficiently reflects the intention of the Parliament that the Town Planners Act 1995 is not to restrict other professions from continuing their practice under their respective laws. In this regard, reference could be made to the Parliament Hansard Bil 25 dated 5 September 1995, at p 26 as reproduced below:

E

...

F

Sebelum saya menjawab beberapa perkara yang dibangkitkan oleh Ahli-ahli Yang Berhormat, saya ingin menegaskan disini bahawa tujuan utama Rang Undang-undang ini ialah untuk membuat peruntukan mengenai pendaftaran perancang Bandar dan juga mengawalselia amalan profesion perancangan Bandar. Di samping itu juga untuk meningkatkan taraf profesionalisme dan mutu perancangan bandar dan Akta ini tidak menyekat mana-mana profesion lain dari meneruskan amalan mereka di bawah undang-undang bertulis profesion masing-masing.

G

...

H

[30] It is trite that when the legislative enacts any subsequent law, it is presumed to have the existing law in mind (see: *Pinpoint Consortium (M) Sdn Bhd v Mammoth Empire Land Sdn Bhd* [2020] 10 MLJ 60; [2020] 5 CLJ 281, Wong Kian Kheong J (now JCA)). The Town Planners Act 1995 was passed much later than the Architects Act 1967. Coincidentally, the above intention of the Parliament is consonant with the then Parliament in year 1967, when the Architects Act 1967 was presented in the form of a Bill. The Parliamentary Debates Volume IV No 12 dated 25 August 1967, Col 2424–2425 which reads:

I

...

There is already at present an Architects Ordinance enacted in 1951. The Ordinance provides that only those who are registered under the Architects Ordinance of 1951 may submit plans and drawings required by the building authorities, which is defined in the Architects Ordinance as any municipality, town board and any rural board constituted or created under the provisions of any written law relating to municipalities or town boards in force in the Federation and any other person or body required under the provisions of any written law to approve building plans. As plans and drawings submitted to building authorities also contain engineering and quantity surveying components, the engineers and the quantity surveyors consider that they too should be given the right to submit plans and drawings to building authorities; hence, the proposal to legislate separately for the architects, the engineers and the quantity surveyors.

...

[31] From the foregoing, it can be concluded that the intention of Parliament in incorporating certain entitlement into the Act regulating certain profession is not to put any profession in a position better than the other. It cannot be that the profession of registered town planner takes precedence over an architect and vice versa. Therefore, without anything to the contrary, the preference of one profession over the other in one particular matter (such as the submission of application for planning permission), should not be accepted.

[32] The bill for the Town Planners Act 1995 was introduced on the same day with the Town and Country Planning (Amendment) Act 1995 (Act A933). This sought to introduce the new s 21C into TCPA 1976. The purpose of the new s 21C was can be found in the Parliament Hansard Bil 25 dated 5 September 1995, at p 30 as reproduced below:

...

Seskyen baru 21C — Dicapangkan untuk menetapkan bahawa semua pelan, rancangan, laporan lukisan, peta dan dokumen yang dikehendaki disediakan dibawah akta ini dibuat oleh orang yang berkelayakan. Cadangan ini dibuat untuk memastikan mereka yang berkelayakan dan berpengalaman sahaja yang dipertanggungjawabkan menyediakan pelan-pelan dan dokumen-dokumen ini yang lazimnya mengandungi aspek-aspek teknikal dan kepakaran tertentu.

...

[33] The section did not state either the town planner or architect, but rather, the intention of the Parliament is that only those who are entitled and experienced be accountable to prepare plans and documents which typically contain technical aspects and certain expertise.

- A [34] Therefore, founded on the foregoing, the first respondent in making the impugned decision, especially in light of their failure to rebut the same through their affidavit, in the view of this court is tainted with illegality and warrants the intervention of this court.
- B *The source of power leading to the impugned decision*
- C [35] The third respondent and the fourth respondent took the position that they did not stop any eligible person from submitting an application for planning permission. They too averred that they have no control over the contents of the checklist issued by the first respondent, specifically the precondition that the submission must be made through a registered town planner. In fact, the version prepared by the third respondent and fourth respondent does not contain such requirement.
- D [36] Learned federal counsel in her written submission submitted that the applicant's grievance is limited only to whether only registered town planner is entitled to submit application for planning permission and the applicant should not be allowed to challenge other aspect of the application like 'whether relevant professional must be first registered with the Jabatan Perancangan Bandar dan Desa Negeri Selangor before Planning Approvals could be submitted'.
- E
- F [37] In this regard, in the case of *Perbadanan Pengurusan Sunrise Garden Kondominium v Sunway City (Penang) Sdn Bhd & Ors and another appeal* [2023] 2 MLJ 621; [2023] 2 CLJ 333 Nallini Pathmanathan FCJ in delivering the grounds of the Federal Court had said:
- G [75] The net consequence of looking at the local authority's decision in vacuo, as we were urged to do by the respondents, is that the issuance of guidelines at the behest of anybody which is tasked with supervising the local authority, or from whom the local authority takes directions, such as the State planning committee, is effectively immunised from the application of the TCPA. A contravention of the TCPA then becomes immune from rectification or any other consequences that ensue.
- H [76] That cannot be a correct interpretation of the law in this context. In a judicial review application of this nature, what is before the court is the decision of the local authority to approve or reject planning permission. It necessarily follows that in arriving at a decision to approve or reject planning permission, the local authority is tasked with adhering to the several provisions of the TCPA, and any other relevant law or regulations. So, where there is a failure to adhere to the law, or where a decision has been taken on the direction of a related supervisory body which in itself has no authority to issue such a directive, it follows that that particular stage or step in the planning approval process is flawed. That flaw or error or act or omission without legal basis then taints the planning approval process, and consequently the final decision. For that reason, it is within this court's jurisdiction in these appeals to
- I

consider the legality of the directives issued by the State planning committee, as they comprise a part of the process of granting approval for the development of the subject land.

A

...

[78] ... It was put forward to us by learned counsel for the first respondents that it is not for the local authority to question the validity of directions given by the State planning committee. This, again, cannot be the correct interpretation of the law, because that would tantamount to a fetter on its discretion as statutorily provided for in s 22. The local authority should not therefore blindly follow any and all directions by the State planning committee, without ascertaining whether there is compliance with the TCPA. We will address this further in Part XI of this judgment.

B

C

...

[84] In determining whether or not the planning approval is valid, it is therefore necessary for the court to examine, consider and determine whether the provisions of the TCPA were followed by the local authority, in substance. Where there is a reference to the State Authority, the National planning council or the State planning authority in the TCPA, which reference contributes towards, or underlies the decision-making process of the local authority under s 22, it is not necessary for all these entities to be made parties separately. That would lead to confusion and a multiplicity of representations, the culmination of which is contained in the approval or rejection of the planning approval.

D

E

[85] The directives issued by these authorities purportedly pursuant to the TCPA set out the basis upon which the local authority makes its decision. It is trite that any such directives and/or guidelines must conform to the TCPA. Ultimately, there is a culmination of these various duties and functions in the decision-making function of the local authority. Therefore, when that decision to grant or reject approval is made, it is open to the courts to scrutinise and ensure that the decision was in accordance with the statutory provisions of the TCPA. The provisions ensure that the object and purpose of the statute are detailed and specific. A deviation from the statute by for example, the issuance of directives or guidelines without any empowering statutory provision for such deviation, can come under question and scrutiny, be it as a consequence of a preceding directive from the State planning authority or the State Director.

F

G

[86] It is therefore, with the greatest respect, untenable to suggest that a contravention of the TCPA on the part of the local authority in arriving at a decision ought to be ignored simply because it is premised on a directive from another body within the planning procedure statute but was issued without statutory basis. It is equally incorrect to suggest that such a lacuna must be ignored because the entity issuing the directive is not a party to the proceedings and must be heard. On the contrary, if an infringement is prima facie made out by the challenging party, it is incumbent upon the local authority whose decision is under challenge and who is accorded a full opportunity to be heard to establish that the entire process culminating in its final decision was validly undertaken on the basis of the express provisions of the TCPA. That is the case here in relation to the use of the pelan dasar in the absence of a local plan.

H

I

- A [87] Any such explanation from the local authority relating to the grant or rejection of approval will necessarily include the validity of directives and guidelines issued by other third parties involved intimately in the crafting of procedures for the granting of approval. It goes without saying that any such procedure or guidelines must comply with the provisions of the TCPA. Otherwise, it would be open to the
- B planning authorities to simply ignore various provisions of the TCPA and for the local authority to maintain that its decision is unimpeachable, as any contraventions are attributable to higher authorities such as the State planning committee or the State authority.
- C [38] The Federal Court in *Perbadanan Pengurusan Sunrise Garden Kondominium* found that the court is to look not only at the impugned decision in vacuo but also the surrounding directives and/or guidelines leading up to the impugned decision.
- D [39] Therefore, in determining whether the impugned decision is susceptible to judicial review, the court is entitled to look into all the source of power (ie the guidelines, directives and/or circular) leading up to the impugned decision. It does not matter when the directive was made, or how long it has
- E been in force. So long as the directive is ultra vires the principal Act, the impugned decision is tainted with illegality.
- F [40] There is no evidence pertaining to the directive or circular or guideline the first respondent relied upon in coming out with the impugned decision. Reference could be made to the letter dated 4 April 2021 issued by the second respondent in reply to the query posed by the applicant (exh G4, encl 3, p 87). According to the second respondent, in relation to the person eligible to prepare and submit plans and documents of planning permission, the practice is that it is based upon the policy and guideline of the respective local authority.
- G [41] The second respondent however took the position that the current practice could be continued to prevent confusion amongst person processing the application and person submitting the application in the state of Selangor. In any event, this is subject to the evaluation of the local authority on a case by
- H case basis so that the coordination of the application procedure does not affect the period or timeframe for the approval of application.
- I [42] The applicant however believed that the impugned decision is based upon two circulars issued by the Selangor Town and Country Planning Department No 1 of year 2005 dated 31 December 2005 ('2005 Circular') (exh G15, encl 67, p 96), and the Selangor Town and Country Planning Department Circular No 1 of year 2006, dated 24 February 2006 ('2006 Circular') (exh G15, encl 101, p 82). The first respondent did not

expressly deny, the second respondent did not file any affidavit, and the third and fourth respondent pleaded ignorance.

A

[43] Under the 2005 Circular subject to the adoption by the local authority, there exists a registration system with the local planning authority, and only consultants registered with such local planning authority is allowed to execute plans and supporting documents pertaining to the application for planning permission.

B

[44] Under the 2006 Circular which repealed the 2005 Circular, there exists a centralised registration system placed with the Town and Country Planning Department for the state of Selangor. The 2006 Circular states that only consultant registered with the Department is entitled to sign plans and documents pertaining to application of planning permission. It further stipulates that it is mandatory for the local planning authority to adopt such 2006 Circular.

C

D

[45] Both the circulars required the applicant to have the membership of the Board of Town Planners and the Malaysian Institute of Planners.

E

[46] According to the second respondent, preference is given to town planners by virtue of the 2005 Circular and 2006 Circular to handle planning permission because they have the knowledge and expertise pertaining to the development in the state of Selangor. This is in line with the decision of the Majlis Mesyuarat Kerajaan Negeri on 29 July 1992.

F

[47] Assuming the 2006 Circular is a rule under para 58(2)(h) of the TCPA 1976, this court is of the view that it is ultra vires the provision of sub-s 58(3) of the TCPA 1976 which stipulated that 'the entitlement of such person shall not be affected', and the legislative intent of s 21C of the TCPA read with s 13 of the Town Planners Act 1995, as alluded to earlier.

G

[48] In any event, this court is of the considered view that pursuant to s 22 of the TCPA 1976, it is incumbent upon the local planning authority to consider each application for planning permission on a case to case basis.

H

CONCLUSION

[49] For the aforementioned reasons, this court is satisfied the applicant is entitled to the following reliefs:

I

- (a) in respect of para 2.1, a declaration to the extent that it applies to the Town and Country Planning Act 1976 only; and

A (b) in respect of para 2.2, a declaration only to the extent of the first and second respondent.

[50] No order as to costs.

B *Order accordingly.*

Reported by Nabilah Syahida Abdullah Salleh

C

D

E

F

G

H

I